IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. 77 of 2004

Judgment reserved on 28.5.2007

Date of decision July 6, 2007

Gulam Rasool **…Appellant.**

Versus

State of H.P. **…Respondent.**

Coram

The Hon'ble Mr. Justice : Surjit Singh, Judge.
The Hon'ble Mr. Justice : Sanjay Karol, Judge.

Whether approved for reporting?

For the appellant : Mr. Anup Chitkara, with Mr. Bhupender Ahuja, Advocates.

For the respondent : Mr. Som Dutt, Addl. A.G., with Mr. D.S. Nainta, Deputy Advocate General

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Surjit Singh, Judge

Appellant is aggrieved by the judgment of the trial Court, whereby he has been convicted of offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act and sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rupees one lakh; in default of payment of fine to undergo rigorous imprisonment for further period of two years.

2. Prosecution version, as per evidence on record, may be summarized thus. On 29.1.2002 PW-14 ASI Joga Singh, Incharge Police Post, Banikhet had been checking the buses during night at Police Post

Banikhet. Around 11.15 p.m. a bus, which started from Bharmaur and was bound for Dharamshala, reached the said Police Post. The bus stopped at the barrier put up at the site of check post. PW-14 ASI Joga Singh accompanied by PW-3 HHC Desh Raj and PW-8 Ram Parkash, Constable went inside the bus to do checking. In the course of checking of the passengers and their luggage, appellant who was occupying seat No. 19, was found to have hidden a plastic packet inside the 'Pyjami' worn by him. It was taken out and was found to contain 'Charas'. Appellant was made to alight from the bus in the presence of the driver and the conductor of the bus, namely PW-12 Ashok Kumar and PW-13, Sarup Chand, respectively. The 'charas' was weighed with the scales and weights, which were arranged from a nearby shop. The weight was found to be 900 grams. Two samples, each weighing 10 grams, were separated. The samples and the rest of the recovered stuff were made up into three separate parcels. The parcels were sealed with a seal that produced the impression of English letter 'D'. Specimen impressions of the seals were affixed on a piece of cloth. NCB form was filled in. Written report of the search and seizure was prepared and sent to the Police Station for the registration of the case. The case property was deposited with the S.H.O. Shri Jitender Kumar, Inspector (PW-9), who affixed his own seal, which produced the impression of English letter 'A'. One of the two sample parcels was sent to the Chemical Examiner, who opined that it contained contents of 'Charas', because it had 26.37% resin.

3. Appellant took no specific defence plea. His plea was of denial simpliciter. Trial Court found him guilty and accordingly convicted and sentenced him, as aforesaid.

4. Learned counsel representing the appellant made two-fold submissions. His first submission was that this was a case where provision of Section 50 of the Narcotic Drugs & Psychotropic Substances Act was attracted, but it had been given a complete go-bye by the Investigating Officer. His second submission was that the stuff contained 'Charas' only to a limited extent, i.e. 26.37%, and hence the quantity allegedly recovered, needed to be calculated on the basis of the percentage of 'Charas' in the stuff.

5. We have considered both the submissions in the light of the evidence on record.

6. It has been stated by PW-14 Joga Singh, ASI, who conducted the search, as also by PW-3 HHC Desh Raj and PW-8 Constable Ram Parkash, in no uncertain terms, that when the checking of the passengers and their baggage was being done, the appellant, who was occupying seat No. 19, was found to have hidden a polythene bag inside the 'Pyjami', which he was wearing and that that bag contained 'Charas' All of them have stated that after recovery of the 'Charas' the appellant was made to de-board the bus and thereafter the 'Charas' was weighed and two samples, each weighing 10 grams, were separated from it in the presence of the driver and the conductor of the bus, namely PW-12 Ashok Kumar and PW-13 Sarup Singh, respectively.

7. Learned counsel representing the appellant drew our attention to a portion of the cross-examination part of the statement of PW-3 HHC Desh Raj, wherein he stated that the accused was asked by the Investigating Officer if he wanted to be searched by him or by some Gazetted Officer or Magistrate. Learned counsel submitted that even

though PW-3 Desh Raj had testified that the accused was asked whether he wanted to be searched on the spot, by the police officials present there, or to be taken to some Gazetted Officer or Magistrate, but all other witnesses, including the Investigating Officer PW-14 Joga Singh, denied that the appellant had been apprised of his right to be searched in the presence of a Magistrate or a Gazetted Officer, under Section 50 of the Act or any offer on the basis of this plea was made to him. He urged that the testimony of PW-3 Desh Raj, HHC suggested that either the police officials, who carried out the search, were having prior information or they had the reason to believe from personal knowledge that the appellant was carrying some narcotic drug or psychotropic substance.

8. To buttress his submission, learned counsel placed reliance upon a Division Bench judgment of this Court in **Sunil Kumar vs. State of H.P.,** [Latest HLJ 2004 (HP) (DB) 1196]. The facts of that case were that during the course of checking of passengers of a bus one passenger was observed concealing something under his clothes. He was required to alight from the bus and thereafter his person was searched and during the course of his search 'Charas' was recovered. In the present case the facts are different. Here during the course of the checking of the passengers in the bus itself, a polythene bag containing 'Charas' had been recovered which the appellant had hidden inside the 'Pyjami', which he was wearing. Thus, this was a case of chance recovery. No doubt PW-3 Desh Raj's testimony that the appellant was given offer to be searched in the presence of a Magistrate or a Gazetted Officer, gives the impression that the Investigating Officer had some information or knowledge about the appellant having 'charas' with him, but an over-all reading of the testimony

of the Investigating Officer, namely PW-14 Joga singh, PW-3 Desh Raj and PW-8 Ram Parkash, Constable, leaves no doubt that PW-14 Joga Singh had no prior information or knowledge and that the 'Charas' was recovered in the bus itself, when the general search of the appellant and the other passengers was being carried out. The testimony of PW-3 Desh Raj about the alleged offer to the appellant appears to be incorrect, because in his statement under Section 161 of the Code of Criminal Procedure, with which he was confronted by the defence itself, there is no mention of such an offer.

9. Learned counsel also placed reliance on a Division Bench judgment of Patna High Court in **Md. Sarfraj vs. State of Bihar,** [2004 (1) Crimes 491]. In that case also the facts were different from the facts of the present case. There the checking of the passengers traveling by a train was done by the Inspector Customs. The accused was noticed in a frightened posture and he appeared to have wrapped and tied some stuff around his waist. He was taken to the Customs office and there in the presence of Superintendent, search was conducted and 'Charas' recovered. That means, the 'Charas' was not recovered inside the train, but during the course of search carried out in Customs office. As already noticed, the case in hand is one of chance recovery during the course of the checking of the persons and luggage of the passengers inside the bus itself.

10. For the foregoing reasons, the first submission made on behalf of the appellant is rejected.

11. The next submission made on behalf of the appellant / convict is that he was sent up for trial for possessing 'Charas' and the 'Charas', as

per definition contained in sub-clause (a) of Clause (iii) of Section 2 of the Narcotic Drugs & Psychotropic Substances Act, means resin, in whatever form, whether crude or purified, obtained from cannabis plant and also includes concentrated preparation known as ‘Hashish oil’ or ‘liquid Hashish’. It has been submitted that in the present case, as per report of the Chemical Examiner, the entire sample stuff was not resin or say ‘Charas’, but only a part of it, to the extent of 26.37 per cent, was resin and, hence, the appellant cannot be said to be in possession of 900 grams of ‘Charas’. He says that what was in possession of the appellant was not whole ‘Charas’ but something which included ‘Charas’ (resin) to the extent of 26.37 per cent only and the rest of the stuff was some unknown substance about which report of the Chemical Examiner is silent. He has taken us through the report of the Chemical Examiner Ext. PX, per which the sample contained contents of ‘charas’.

12. We find ourselves in agreement with the aforesaid submission of the learned counsel for the appellant. His submission is supported by the judgment delivered by a Division bench of this Court, in **Dharam Pal Vs. State of Himachal Pradesh,** and another appeal (Criminal Appeal Nos. 491 & 510 of 2003) decided on 15.5.2007. In the aforesaid case it has been held that only the resin content of the stuff is ‘Charas’ and that in the absence of the report of the Chemical Examiner about the rest of the contents of the stuff, the quantity of the ‘Charas, based on the percentage of the resin found therein by the Chemical Examiner, is required to be worked out and the appellant – accused is to be held responsible for possessing ‘Charas’ only to the extent, the stuff contained the resin content in it.

13. As noticed hereinabove, the total quantity of stuff recovered from the appellant was 900 grams. The Chemical Examiner has found resin contents in it to the extent of 26.37 per cent. That means, the 'Charas' / resin content in the recovered stuff was 237 grams. This quantity is less than the commercial quantity as specified vide Notification No.S.O. 1055(E), dated 19th October, 2001, issued by the Central Government, even though more than the upper limit of the small quantity fixed by the same Notification. Thus, the appellant is liable to be punished not under Section 20(C) of the Narcotic Drugs and Psychotropic Substances Act, as done by the trial Court, but under Section 20(B) of the said Act for which no minimum sentence is prescribed. The offence under Section 20(B) is punishable with imprisonment that may extend to ten years and with fine which may extend to Rupees one lakh.

14. The appellant is a previous convict. Earlier also he was convicted of offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act (in case FIR No. 34 of 1998) and sentenced to undergo rigorous imprisonment for ten years, per unchallenged testimony of PW-11 Jai Gopal, Deputy Superintendent, Model Central Jail, Nahan. Appellant was on parole of fourteen days from 18th January to 31st January, 2001 when he committed the present offence. Therefore, he does not deserve any leniency in the matter of award of punishment. However, looking to the quantity of resin / Charas found in the stuff recovered from the appellant, we feel that the ends of justice would be met in case his sentence is reduced from ten years rigorous imprisonment and a fine of rupees one lakh to six years rigorous imprisonment and a fine of Rs.20,000/-; in default

of payment of fine, simple imprisonment for a further period of six months. We order accordingly.

15. Appeal stands disposed of.

(Surjit Singh)
Judge

July 6, 2007 (BC)

(Sanjay Karol)
Judge